Petition

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ALIOTO'S FISH COMPANY, LTD., et al.,

Petitioners,

vs.

HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the opinion below was incorrect in holding that there was insufficient evidence to show that petitioners were being forced by the HRC to enter into a new affirmative action agreement.

2. Whether the decision below conflicts with Title VII of the Civil Rights Act of 1964 and this Court's decision in United Steelworkers v. Weber.

3. Whether the opinion below is contrary to the equal protection clause of the Fourteenth Amendment and to this Court's decision in Regents of University of California v. Bakke.

THE PARTIES

Petitioners are various corporations and partnerships operating restaurants leased from the City and County of San Francisco through the San Francisco Port Commission. Petitioners include Alioto's Fish Company, Ltd., a corporation; Borruso's Lighthouse Seafood Grotto, a partnership; Fisherman's Grotto, a partnership; the Franciscan Restaurant, a corporation; Sabella's and La Torre Restaurant, a corporation; Scoma's Restaurant, a corporation; Tarantino's Restaurant, a corporation; Victoria Staticn, a corporation; Bundox Restaurant d/b/a The Waterfront, a corporation; Sinbad's Pier #2 Restaurant, a corporation; and Carnation Co., Inc., a corporation.

Respondents are the Human Rights Commission of San Francisco ("HRC"), the San

Francisco Port Commission ("Port Commission") and their respective commissioners, directors and employees, including Grant Mickins, Executive Director of the HRC; Tony Grafilo, Carlota Del Poipillo, Rabbi Alvin Fine, Sylvester Hering, Sister Bernadette Giles, Lilian Sing, Vernon Alley, Enola Maxwell, Daniel Silva, Nadin Zarour, Phyllis Lyon, John Morrissey, Caryl Mezey, William Wesley, and David Yamakawa, HRC Commissioners; Thomas Soules, Executive Director of the Port Commission; Harry Bridges, Richard Goldman, Byron Arnold, James Ruddin, and Jack Morrison, Commissioners of the Port Commission.

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ALIOTO'S FISH COMPANY, LTD., et al.,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE CALIFORNIA SUPREME COURT

Petitioners, ALIOTO'S FISH CO., LTD., et al., pray that a Writ of Certiorari issue to review the order of the California Supreme Court entered on August 12, 1981, denying hearing, and the decision by the Court of Appeal, State of California, First Appellate District, Division 2, entered on June 18, 1981.

OPINION BELOW

No opinion was rendered by the California Supreme Court. An order denying hearing by that court was entered on August 12, 1981, a copy of which is attached as Appendix 1.

The opinion of the Court of Appeal of the State of California, First Appellate District, Division 2, is reported at 120 Cal. App.3d 594, 174 Cal. Rptr. 763 (1981), a copy of which is attached as Appendix 2.

The judgment and declaratory judgment, permanent injunction, and notice of entry of judgment of the Superior Court of California, County of San Francisco, not reported, are attached as Appendix 3.

JURISDICTION

The judgment, declaratory judgment and permanent injunction were entered by the Superior Court of California, County of San Francisco, on November 30, 1977. A notice of

entry of judgment was filed on December 1, 1977.

The opinion of the Court of Appeal of the State of California, First Appellate District, Division 2, was filed on June 18, 1981. A timely petition for hearing filed in the California Supreme Court was denied on August 12, 1981. An order extending time to file petition for writ of certiorari was entered by Justice William H. Rehnquist of this Court on October 29, 1981, extending the date for filing of this petition to December 15, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 14th Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to

the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

United States Code, Title 42, Section 2000e-2:

(a) It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

. . .

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

. . .

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship

> or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

STATEMENT OF THE CASE

Petitioners are a group of restaurants operated on property leased from the City and County of San Francisco, through the Port Commission. The leases entered into between the individual restaurants and the Port Commission incorporate by reference the employment non-discrimination provisions of Chap-

ter 12B, Section 12B.2 of the San Francisco Administrative Code. 1/

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1. Section 12B.2 of the San Francisco Administrative Code provides:

> (a) Wherever the work is performed or supplies are manufactured in the United States, the contractor, subcontractor or supplier will not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age, sex, or sexual orientation. The contractor, subcontractor or supplier will take affirmative action to insure that applicants are employed, and that employees are treated without regard to their race, color, religion, ancestry, national origin, age, sex, or sexual orientation. Such action shall include:, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. (San Francisco, Cal. Admin. Code §12B.2(h) (1977).)

Chapter 12B was amended in 1974 to specifically refer to leases. Several of the petitioners signed their leases before the 1974 amendment.

The HRC is vested with authority to enforce the non-discrimination provisions contained in petitioners' leases with the Port Commission. A finding by the HRC that the non-discrimination provisions have been breached may subject the restaurant-lessee to financial penalties, exclusion from future bidding for leases, and immediate cancellation of the lease. SAN FRANCISCO, CAL., ADMIN. CODE §12B.2(f)-(h)(1977).

From 1970 to 1975, the restaurants entered into annual affirmative action agreements with the Port Commission and the HRC. The most recent agreement expired on October 25, 1976. The agreement, although characterized as "voluntary" by the HRC and the Port Commission, was imposed upon the restau-

rants under threat that their leases would be cancelled unless they signed the agreement.2/

Further, the agreement contained mandatory quotas with respect to the hiring, promotion and training of minorities and women. Petitioners were also required under the agreement to submit quarterly reports indicating the number of applicants, new hires, terminations, applications placed in an affirmative action file, promotions, trainees, and total current employees, categorized by race, ethnic group and sex.

A report was prepared by the HRC in August, 1976, based upon the employment data provided by petitioners under the agreement. The report stated in essence that the employ-

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2. The Agreement provided: "any restaurants receiving Port Commission leases, having five or more employees and not listed above, shall become signators to this Agreement as a condition of their lease agreement with the City and County of San Francisco." (Emphasis added.)

ment quotas imposed upon the restaurants in the affirmative action agreement had not been met for the years 1973 through 1975. The report advocated "aggressive use" of the complaint process (referring to the penalty provisions of Section 12B.2 of the San Francisco Administrative Code) if petitioners did not begin to comply with the quotas imposed by the agreement. The report also noted that in the past non-compliance proceedings had been threatened and, in one case, a complaint had been filed by the HRC in order to obtain the quarterly surveys from petitioners.

Shortly after this report was completed, it was the subject of several local newspaper articles. The articles contained statistics concerning the racial and sexual composition of petitioners' work force and noted that the HRC had the authority to recommend cancellation of restaurant leases if it found non-

compliance with the affirmative action agreement.

When the 1975-76 affirmative action agreement expired in October, 1976, the HRC proposed a new agreement for 1976-77. The proposed agreement contained provisions similar to the expired plan, including employment quotas and preferential treatment for minorities and women. Significantly, the proposed agreement set even higher goals for the hiring of minorities and women, fifty percent minorities and sixty percent women, and promotion goals of eighty percent minorities and forty percent women. The new agreement also demanded that job vacancies be filled by applicants from an affirmative action file before traditional recruitment procedures could be utilized. Further, if recruitment procedures did not produce minority and/or female applicants, the agreement

required that the pool of such applicants be increased, without regard to qualifications.

After the proposed agreement was submitted to the restaurants, they met with the HRC and the Port Commission for the purpose of negotiating a new affirmative action agreement. The restaurants proposed their own agreement which affirmed their commitment to non-discrimination policies, but it was rejected by the HRC. During negotiations, both the HRC and the Port Commission stressed that petitioners would lose their leases if they did sign the HRC proposed agreement. No new agreement was reached by the parties.

After negotiations ended, the HRC propounded a questionnaire on the recruitment, hiring and training practices of petitioners. The questionnaire essentially asked for a numerical breakdown of the racial and ethnic identity of the restaurants' employees, by their sex and job classifications. In let-

ters accompanying the questionnaire, the HRC threatened that failure to complete the questionnaire could result in the initiation of non-compliance proceedings, which included cancellation of the restaurants' leases.

Petitioners initiated an action for a writ of mandate, declaratory and injunctive relief against the HRC and the Port Commission, seeking, inter alia, a declaration that petitioners were not required to enter into the affirmative action agreement proposed by the HRC or to answer the HRC questionnaire demanding statistical information on the percentages of minorities and women employed by petitioners. Petitioners also sought an injunction restraining the HRC and Port Commission from requiring them to enter into the proposed affirmative action agreement or to answer the questionnaire as a condition of retaining their leases.

At trial, the restaurants argued that the quota requirements imposed by the HRC were unlawful under the equal protection clause of the fourteenth amendment to the United States Constitution, Title VII of the Civil Rights Acts of 1964, and Sections 1981 and 1983 of Title 42, United States Code, in that they contained race and sex classifications without a showing of any state interest, and required petitioners to engage in reverse discrimination against qualified white male job applicants and employees.

The trial court found that the HRC was attempting to impose quotas upon petitioners in their hiring and promotion practices under the guise of affirmative action agreements. The court held that by engaging in such practices, the HRC and Port Commission had violated the fourteenth amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, and Sections 1981

and 1983 of Title 42, United States Code. On the basis of this unlawful conduct, and on grounds not relevant to the instant petition, the court rendered a judgment granting the requested declaratory and injunctive relief.

On appeal, the restaurants argued that the trial court correctly ruled that respondents' attempt to force the restaurants to enter into affirmative action agreements violated the equal protection clause of the fourteenth amendment to the United States Constitution. Petitioners also asserted that the hiring quotas and affirmative action agreements imposed upon them by the HRC violated Title VII of the Civil Rights Act of 1964, 42 United States Code, §2000(e), et seq.

The state court of appeal reversed the judgment of the lower court and held that there was no evidence that respondents were attempting to impose an affirmative action

agreement on the restaurants. Rather, the court held that the evidence demonstrated that the HRC merely desired to renegotiate an annual affirmative action agreement, and was not attempting to impose racial quotas. The court further held that under the terms of the leases and provisions of the City's administrative code, the HRC was authorized to require the restaurants to answer its questionnaire concerning employment practices.

Petitioners filed a timely petition for hearing in the California Supreme Court. The restaurants contended that if the appellate court decision was allowed to stand, the affirmative action agreement demanded by respondents required unlawful racial quotas, contrary to this Court's decision in United Steelworkers v. Weber, 443 U.S. 193, 99 S.Ct. 2721 (1979) and Regents of University of California v. Bakke, 438 U.S. 265, 98 S.Ct.

2733 (1978). The California Supreme Court denied petitioners' petition for hearing.

REASONS FOR GRANTING THE WRIT

1. The Opinion Below Was Incorrect In Holding That There Was Insufficient Evidence To Show That Petitioners Were Being Forced By The HRC To Enter A New Affirmative Action Agreement

Contrary to the opinion below, the restaurants have clearly presented sufficient evidence to show that a real controversy exists between it and the HRC which warrants equitable judicial relief. The general test developed by the courts to determine whether a case or controversy exists is a showing that the party has a personal stake in the outcome of the proceeding which presents "a real and substantial controversy admitting of specific relief through a decree of conducive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Buckley v. Valeo,

424 U.S. 1, 96 S.Ct. 612 (1976); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461 (1937); Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691 (1962).

The fact that the restaurants seek relief from a threat of future action by the HRC to cancel their leases does not preclude the legal issues raised from being justiciable ones. In Lake Carriers Association v. MacMullan, 406 U.S. 498, 92 S.Ct. 1749 (1972), the plaintiffs sought a declaratory judgment that certain state pollution control laws were pre-empted by Federal law. Specifically, the plaintiffs contended that state law conflicted with Federal standards not yet promulgated. The trial court dismissed the complaint, declaring that plaintiffs were seeking an advisory opinion only, and that no justiciable controversy existed. The court also relied on the abstention doctrine in dismissing the lawsuit. Although this Court

affirmed the trial court's decision to abstain, it disagreed that the complaint did not present a justiciable controversy. In so holding, this Court stated:

> The test to be applied, of course, is the familiar one stated in Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1956): "Basically, the question in each case is whether. . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. 406 U.S. at 506, 92 S.Ct. at 1755.

Thus, this Court noted that although the plaintiffs contended that the state laws would be pre-empted only once the federal standards were promulgated in the future, there nevertheless existed a present obligation to comply with the state statute. This Court concluded, therefore, that this present obligation "in and of itself makes their attack on the validity of the law a

live controversy, and not an attempt to gain an advisory opinion." 406 U.S. at 507, 92 S.Ct. at 1755.

In the instant case, the restaurants have a present obligation to comply with the HRC's request to submit statistical information pursuant to the HRC questionnaire. The evidence clearly established that the intent of the HRC in promulgating the questionnaire was to use that information to determine whether compliance proceedings against the restaurant were warranted. Those proceedings could not only result in severe financial penalties, but could result in the restaurants losing their leases with the Port Commission.

The evidence also clearly established that the HRC intends to take adverse action against the restaurants if they are found not to be in compliance with the HRC's imposed quotas with respect to the hiring, training

and promotion of women and minorities. That such action will be taken is more than a hypothetical possibility. In its August, 1976 report, the HRC threatened that it would "aggressively use" the complaint process against the restaurants if they were found not to be in compliance with the quota requirements imposed by former affirmative action agreements. In the HRC's letter accompanying its questionnaire to the restaurants, it stated that the questionnaire was "used by the HRC as a first step towards determining the components of an affirmative action program which will bring the employer into compliance." When that statement is examined in the context of the HRC's former affirmative action agreements with the restaurants, there can be no doubt that the questionnaire be would used solely for the purpose of establishing new quotas to be imposed upon the restaurats. This is demon-

strated by the fact that both the previous and proposed affirmative action agreements are cast in terms of statistical parity. Further, the questionnaire was promulgated only after the restaurants and the HRC were unable to agree as to the nature of the quotas to be imposed. Also significant is the HRC's August, 1976 report where it is noted only that the restaurants failed to meet their goals but does not contain any allegation that the restaurants engaged in discriminatory employment practices. Finally, and most signficantly, the HRC continually expressed throughout negotiations for a new affirmative action agreement that if the restaurants did not enter into such an agreement, their leases would be cancelled. All of these factors, when viewed in combination, demonstrate that an actual controversy exists between the HRC and the restaurants and that the HRC is attempting to force the

restaurants into entering a new affirmative action agreement.

2. The Decision Below Conflicts With Title VII Of The Civil Rights Act Of 1964, Sections 703(a), (d) and (j) As Amended, 42 U.S.C.A., Sections 2000e - 2(a), (d) And (j) (1974) And This Court's Decision In United Steelworkers v. Weber.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of an individual's race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2 (1974). As this Court noted in Griggs v. Duke Power Company, 401 U.S. 424, 99 S.Ct. 849 (1971) the objective of Congress in enacting Title VII was to achieve equality of employment opportunities and to remove barriers that operated in the past to the detriment of minorities and women. The Court correctly pointed out, however, that the congressional purpose in enacting Title VII was not to guarantee a job to any person, regardless of qualification,

by virtue of membership in a minority group. Rather, discriminatory preference on the basis of racial or other classifications is exactly what Congress intended Title VII to prohibit. 401 U.S. at 431, 91 S.Ct. at 853.

In considering the nature of proof in actions under Title VII, this Court held in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) that a complainant in a Title VII action carries the burden of establishing that the employer has engaged in an unlawful employment practice if it is shown that: (1) he is a member of a minority group; (2) he applied and was qualified for the position the employer was seeking to fill; (3) despite his qualifications, he was rejected; and (4) after rejection, the employer continued seeking to fill the position. 411 U.S. at 801, 93 S.Ct. at 1824. Although an employer must attempt to balance its own interests with those of its employees

and customers in establishing fair and racially neutral employment and personnel policies, this Court succinctly pointed out the limitation on such policy-making imposed by Title VII: "[i]n the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." 411 U.S. at 801, 93 S.Ct. at 1823-24. An employer can only defend a prima facie showing of a discriminatory employment practice by articulating "some legitimate, nondiscriminatory reason for the employee's rejection." Id.

In United Steelworkers v. Weber, 443 U.S. 193, 99 S.Ct. 2721 (1979), this Court examined the issue of whether Title VII prohibits employers from entering into voluntary affirmative action plans that provide for racial preferences in employment practices. In holding that such voluntary plans are permissible, the Court emphasized the

limited basis for reaching this conclusion: (1) the plan in question was voluntary in nature; (2) the plan was entered into pursuant to a collective bargaining agreement between the employer and the union representing the employees subject to the plan; (3) the plan was designed to eradicate historically entrenched patterns of racial segregation and hierarchy; (4) the plan was intended to increase employment opportunities for blacks in occupations from which they historically had been excluded; and, significantly, (5) the plan did not "unnecessarily trammel the interests of white employees." 443 U.S. at 202, 99 S.Ct. at 2730.

In applying the above criteria to the instant case, it is clear that the affirmative action plan imposed by the HRC upon the restaurants falls on the impermissible side of the line of demarcation between lawful and unlawful affirmative action plans. None of

the safeguards built into the Weber plan are present in the proposed HRC plan. First, the plan cannot in any sense of the word be characterized as "voluntary". The language of the most recent affirmative action agreement expressly provided that the restaurants' acquiescence to the provisions of the agreement was a condition of their lease to the property upon which they conducted business. Without the leases, there would be no business to operate.

The second important distinction between the HRC's plan and the plan in Weber is that the restaurants are precluded from collectively bargaining with any labor organization which may represent its employees concerning affirmative action requirements clearly affecting the terms and conditions of employment of its workers. If the restaurants are forced to enter into an affirmative action agreement with the HRC, that plan will not

only interfere with established collective bargaining relationships between the union and the restaurants, but will also be contrary to federal legislation governing collective bargaining relationships between employers and employees. 3/

Section 9(a) of the National Labor Relations Act, as amended, 29 U.S.C.A. §159(a) (1974) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment .

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3. Some of the petitioners are parties to collective bargaining agreements with Hotel and Restaurant Employees and Bartenders Union, Local 2, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

If the restaurants are required to enter into affirmative action agreements with the HRC, they will be placed in the untenable position of choosing between losing their leases, and thus their capability to operate a business, or subjecting themselves to unfair labor practice charges under applicable federal labor laws.

A third distinction between the instant case and Weber is that the plan in Weber was established to eradicate past discrimination against blacks in craft unions and in skilled craft occupations. There was no evidence presented in the instant case to show that patterns of racial segregation existed in the restaurant industry in San Francisco prior to the imposition of affirmative action plans

upon petitioners by the HRC. 4/ Indeed, the restaurants employment statistics demonstrated that minorities constituted more than fifty percent of the restaurants' work force. Absent any showing of past racial discrimination or underrepresentation of minorities in the employers' work force, an affirmative action plan like the one presented in the instant case is neither permissible nor required under Title VII.

The most significant distinction between the HRC's proposed plan and the plan held permissible in Weber is the deprivation of the rights of white employees under the HRC proposal. The plan in Weber only required that half of new traineees be members of a

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4. The HRC did not even attempt to present evidence regarding past discrimination until after the legality of its proposed affirmative action plan had been challenged by the restaurants. The trial court correctly ruled that the HRC's offer of evidence at trial on this matter was untimely and irrelevant.

minority group. Further, the plan was only a temporary measure, intended not to achieve a racial balance, but merely to eliminate racial imbalances. The HRC's proposed plan is much more severe and would operate to deny white applicants and employees any chance for employment opportunities or advancement. The hiring goal imposed by the proposed agreement would be fifty percent minorities and thirty percent women, while the promotion goal would be sixty percent minorities and forty percent women. Assuming that minority female applicants and employees would be included in the quota for women, rather than minorities, a nonminority male applicant or employee would be able to compete for only twenty percent of job vacancies, and would have virtually no promotional opportunities.

Finally, the HRC's imposition of its proposed agreement and questionnaire is in direct conflict with Section 703(j) of Title

VII which provides in explicit language that the Act shall not be interpreted "to require any employer. . . to grant preferential treatment to any individual or to any group because of their race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist" in the employer's work force. 42 U.S.C.A. § 2000e-2(j) (1974). (Emphasis added.)

The lower court's opinion that the restaurants must answer the HRC questionnaire inquiring into the statistical composition of minority and female employees and applicants is tantamount to a requirement to grant preferential treatment to individuals on the basis of their race and sex, when viewed in the factual context of this case. For example, the restaurants have been repeatedly threatened with loss of their leases if they do not submit to the questionnaire and pro-

posed plan. The implication is clear: the restaurants may be forced out of business if they refuse to grant preferential treatment to minorities and women in the manner suggested by the HRC. The statistical information derived from the questionnaire, if answered by the restaurants, could be used to justify cancellation of their leases. Such a cancellation would be based solely on statistical information, without any proof as to discriminatory practices of the restaurants. Such a result is completely at variance with the clear language and purpose of Section 703(j) of Title VII and this Court's decision in Weber, supra.

In sum, it has been long-established that Title VII, by its explicit language and through judicial interpretation, neither requires an employer to maintain a racially balanced work force, Hazelwood School District v. U.S., 433 U.S. 299, 97 S.Ct. 2736

(1977), nor does it require that minorities be preferred over members of the majority merely because minorities are underrepresented in the work force. Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978); Ayon v. Sampson, 547 F.2d 466 (9th Cir. 1976). As this Court succinctly stated in Furnco, supra, "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." 438 U.S. at 579, 98 S.Ct. at 2951, (emphasis in original). It was held in McDonald v. Sante Fe Trail Trans. Co., 427 U.S. 273, 96 S.Ct. 2579 (1976) that Title VII prohibits discrimination against whites as well as blacks. Accord, United Steelworkers v. Weber, supra. Title VII requires only that victims be made whole for

the losses resulting from past discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843 (1977); Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251 (1976); Abemarle v. Moody, 422 U.S. 405, 95 S.Ct. 2362 (1975). Thus, the plan proposed by the HRC in the instant case runs afoul of Title VII on numerous grounds: it is required, rather than voluntary; it discriminates against whites; and it must be implemented despite no showing of past discrimination.

3. The Opinion Below Is Contrary To The Equal Protection Clause Of The Fourteenth Amendment And To This Court's Decision In Regents Of University Of California v. Bakke.

It has long been established that a racial classification is "'constitutionally suspect'... and subject to the 'most rigid scrutiny' ... and 'in most circumstances irrelevant' to any constitutionally accept-

able legislative purpose...." McLaughlin v. Florida, 379 U.S. 184, 192, 85 S.Ct. 283, 288 (1964), quoting Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954), Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193 (1944), Hiradayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385 (1943); see Loving v. Virginia, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823 (1967). It could be justified only by "some overriding statutory purpose" without which the racial classification "is reduced to an invidious discrimination forbidden by the equal protection clause." 379 U.S. at 192-93, 85 S.Ct. at 289.

This Court confronted the issue of racial quotas in employment more than thirty years ago in Hughes v. Superior Court of California, 339 U.S. 460, 70 S.Ct. 718 (1950). The issue posed in that case was whether it was lawful to picket in support of a demand that the proportion of black clerks

employed in a grocery store approximate the proportion of black customers. This Court unanimously affirmed the judgment of the California Supreme Court enjoining the picketers, and stated that "[the picketers] would, to the extent of the fixed proportion, make the right to work. . .dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race." 339 U.S. 460, 463-64, 70 S.Ct. 718, 720 (1950). Mr. Justice Frankfurter, delivering the opinion of the Court, stated:

> California chose to strike at the discrimination inherent in the quota system by means of the equitable remedy of injunction to protect against unwilling submission to such a system. It is not for this Court to deny to California that choice from among all "the various weapons in the armory of the law." 339 U.S. 460, 467, 70 S.Ct. 718, 723.

There is no doubt that the affirmative action plan proposed by the HRC along with its questionnaire raises equal protection issues in that they involve the use of racial classifications. Thus, the plan and questionnaire must be examined with "strict scrutiny" to determine whether their objectives constitute a compelling state interest justifying racial preference.

A review of the plan and questionnaire can lead to no other conclusion but that their use and implementation will involve invidious racial and sexual discrimination which violates the equal protection clause. On its face, the plan requires that minorities and women receive preferential treatment in all facets of the restaurants' employment practices. Qualified white male applicants would clearly be denied equal employment opportunities under the plan. With respect to the proposed questionnaire, the HRC has

made it clear that it will be used to enforce racial and sexual quotas in the absence of an affirmative action agreement. The stated purpose of the questionnaire is to monitor compliance with the nondiscrimination provisions of the restaurants' leases, and may be used to prove non-compliance in a proceeding to impose penalties or cancel the leases of the restaurants. Inasmuch as the questionnaire only calls for statistical information concerning the racial and sexual composition of the restaurants' work force, it is clear that the HRC intends to enforce its affirmative action requirements through the use of a quota system. In the absence of any evidence concerning past discrimination by the restaurants prior to the imposition of the plan and promulgation of the questionnaire, the HRC cannot demonstrate any compelling interest to justify the use of racial preferences. The HRC's attempts, therefore, to achieve

its affirmative action objectives by these methods cannot withstand constitutional scrutiny.

Not only are the HRC affirmative action plan and questionnaire constitutionally deficient, but they impose racial and sexual quotas which were held unlawful in Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978). Bakke involved a special admissions program at the University of California at Davis Medical School under which sixteen out of the hundred places in each entering class were reserved exclusively for minority applicants. The program was challenged both under the equal protection clause of the fourteenth amendment and under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d-2000d-6 (1976), which prohibits the exclusion of any person on the basis of race from an educational program receiving federal funds.

Although the Court was clearly divided as to the basis for its holding that the Davis program was unlawful, a majority agreed that the use of quotas to achieve racial balance was impermissible. Indeed, Justice Powell rejected the distinction between establishing racial "goals" as opposed to racial "quotas", calling it a question of semantics which "is beside the point." 438 U.S. at 288, 98 S.Ct. at 2747. Clearly, the HRC's attempt in the instant case to impose "goals" with respect to the hiring, training and promotion of women and minorities in the restaurants is no different than the quota system employed by Davis Medical School in Bakke. Thus, the restaurants must be left free to reject an affirmative action plan which calls for the use of race and sex quotas in their employment practices.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the California Supreme Court and the opinion and judgment of the Court of Appeal of the State of California, First Appellate District, Division 2. Alternatively, the matter should be remanded for further consideration.

DATED: December 14, 1981.

Respectfully submitted,

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APPENDIX

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

October Term 1981

_____

ALIOTO'S FISH CO., LTD., et al.,
Petitioners,
vs.
HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, et al.,
Respondents.

APPENDIX TO A WRIT OF CERTIORARI

TO THE CALIFORNIA SUPREME COURT

John H. Feldmann, III
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One Embarcadero Center
San Francisco, California 94111
Counsel for Petitioner

Of Counsel:

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APPENDIX 1

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

AUG 12 1981

I have this day filed Order

HEARING DENIED

In re: 1/cv. No. 45288

Alioto's Fish Co.

vs.

Human Rights, etc.

Respectfully,

Clerk

APPENDIX 2

IN THE COURT OF APPEAL/
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

F I L E D
JUN 18 1981
Court of Appeal - First App. Dist.
CLIFFORD C. PORTER, Clerk

ALIOTO'S FISH COMPANY, LTD., et al.,	)	
Plaintiffs and Respondents,	)	1 Civil 45288 (Super. Ct. 718262)
v.	)	
HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, et al.,	)	
Defendants and Appellants.	)	

Respondents, a group of fourteen Fisherman's Wharf restaurants 1/ (hereinafter

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1. The fourteen restaurants are: Alioto's Fish Company Ltd., Borruso's Lighthouse Seafood Grotto, Castagnola's Restaurant, Fisherman's Grotto, The Franciscan Restaurant, Scoma's Restaurant, Tarantino's Restaurant, Victoria Station, Bundox Restaurant dba The Waterfront, Sinbad's Pier #2 Restaurant, Franceschi's Restaurant, Carnation Co., Inc., Pompei's Grotto, and Sabella's & La Torre Restaurant.

"the Restaurants"), instituted this action for writ of mandate and declaratory and injunctive relief against appellants San Francisco Human Rights Commission (hereinafter "HRC"), San Francisco Port Commission (hereinafter "the Port Commission") and their respective commissioners, directors and employees (collectively, "the City"). The Restaurants sought, inter alia, 1) a peremptory writ ordering the HRC to refrain from enforcing a provision contained in their leases of land from the Port Commission which expressly incorporates into each lease agreement the employment nondiscrimination provisions of Chapter 12B of the San Francisco Administrative Code, 2) a declaration that they are not required to enter into an affirmative action agreement proposed by the HRC or to answer an HRC questionnaire regarding their recruitment, hiring and training practices, 3) a declaration that Chapter 12B does

not apply to those restaurants which signed their leases before Chapter 12B was amended specifically to include leases, and 4) an injunction restraining the City from requiring them to enter into the proposed affirmative action agreement or to answer the questionnaire. The Restaurants alleged that Chapter 12B is preempted by the former Fair Employment Practices Act (former Lab. Code, § 1410 et seq., hereinafter "FEPA").2/ In addition, they asserted that the City was attempting to coerce them into entering into an affirmative action agreement which compelled them to practice "reverse discrimination" in violation of equal protection guarantees and Title VII of the Civil Rights Act.

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2. The Fair Employment Practices Act was repealed in 1980. (Stats. 1980, ch. 992, § 11.) Many of its provisions are now codified in the Fair Employment and Housing Act. (Gov. Code, §12900 et seq.)

In this appeal from a judgment which afforded the Restaurants the declaratory and injunctive relief sought, the City challenges the trial court's rulings that: 1) because the Fair Employment Practices Act preempted the field of employment discrimination, local governments might not insert and enforce non-discrimination and affirmative action provisions in their leases of public property; 2) Chapter 12B does not apply to leases, 3) the proposed affirmative action agreement violates the equal protection guarantees of the federal and state Constitutions and Title VII of the Civil Rights Act; and 4) the Restaurants might properly refuse to answer the HRC questionnaire.

For the reasons discussed below, we have concluded that the judgment must be reversed.

I. Factual and procedural background

The contractual provision in issue in this case expressly incorporates into each

restaurant's lease from the Port Commission the employment nondiscrimination provisions of Chapter 12B section 12B.2 of the San Francisco Administrative Code. 3/ Although the leased property is subject to the jurisdiction of the Port Commission, the Human Rights Commission is responsible for enforcing the employment nondiscrimination provisions of the leases.

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3. Under the terms of the lease of Alioto Fish Company, the only lease contained in the record, the Port Commission leases "real property and improvements . . . for a term of sixty-six . . . years, commencing on May 1, 1970." That lease provides: "Nondiscrimination provisions attached hereto are made a part hereof. Where the term 'contractor' is used therein it shall be deemed to mean 'tenant.'"

The parties agree that the 'nondiscrimination provisions' identified in the lease are Chapter 12B section 12B.2 of the San Francisco Administrative Code. The parties further agreee that section 12B.4 in relevant part provides that "[i]n order to be eligible to bid or to have a bid considered by the awarding agency, the contractor in all public works contracts shall submit an affirmative action program which shall meet the requirements of the human rights commission [sic]."

In pertinent part, section 12B.2, subdivision (a) currently provides as follows: "Wherever the work is performed or supplies are manufactured in the United States, the contractor, subcontractor or supplier will not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age, sex or sexual orientation. The contractor, subcontractor or supplier will take affirmative action to ensure that applicants are employed, and that employees are treated equally during employment, without regard to their race, color, religion, ancestry, national origin, age, sex, sexual orientation or disability. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for

training, including apprenticeship."4/ Although, as originally enacted in 1966, Chapter 12B did not specifically refer to leases, the ordinance was amended in 1974 specifically to include leases.5/

From 1970 to 1975, the Port Commission and the Restaurants entered into annual affirmative action agreements. The 1975-76 version of that agreement provided that the agreement would be in effect for twelve months following the date of execution. By

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4. This section was amended in January 1977 to add "disability"; "sex" and "sexual orientation" were added in April, 1972; "age" was added in early 1974. Since the Restaurants' leases were not all signed in the same year, the type of discrimination prohibited by a particular lease may vary.

5. Eight of the Restaurants signed their leases before the 1974 amendment. They are: Alioto's, Borruso's Lighthouse Seafood Grotto, Castagnola's, Fisherman's Grotto, The Franciscan, Sabella's & La Torre's, Victoria Station, and Carnation Company. The remaining Restaurants signed their leases after to the amendment in question.

its terms, the HRC, as a contracting party, was charged with enforcement of its provisions.

The agreement required that "all recruiting, hiring, promotional and general employment practices shall be conducted without discrimination on the basis of race, religion, national origin, sex, sexual orientation or age, as per the Nondiscrimination Ordinance (Chapter 12B) of the City and County of San Francisco." The agreement set forth specific procedures to be followed to implement the Restaurants' promise to "actively recruit minority and female applicants for all employment." Subject to collective bargaining agreements, the Restaurants agreed to keep the applications of minority and female job applicants in an affirmative action file and to utilize this file to obtain applicants where a vacancy could not be filled by rehiring employees on

layoff status, by upgrading existing staff, or by seeking referrals from the appropriate union with emphasis on affirmative action recruitment. The Restaurants further agreed that, if a vacancy could not be filled by resort to such measures, they would notify the Human Rights Commission's recruitment unit and actively recruit from an attached referral source list. Agreement provisions pertaining to training required the Restaurants to make an effort to review minority and female employees for upgrading and to take certain measures for the training of such persons, with special emphasis in areas where they were underrepresented. Under a heading entitled "Goals", the agreement provided: "Each restaurant will have a goal of 50% minority and 30% women for new hires during this agreement year. . . . Each restaurant will have a minimum goal of one minority and one woman trainee during this

agreement year, to be retained upon successful completion of training. This training may include an apprentice from the approved list of bartender or cook apprentices. . . . The goal for promotion during this agreement year will be 60% minority and 40% women. Emphasis in reaching these goals will be given to those groups underrepresented in each individual restaurant and job category."

Under the terms of the agreement, the Restaurants agreed "that a quarterly report, on forms provided by the HRC, shall be submitted which indicates the number of applicants, new hires, terminations, applications placed in Affirmative Action File, promotions, trainees, and total current employees, categorized by race, ethnic group and sex." The Restaurants also agreed "to submit an annual in-depth Employment Survey, on forms provided by the HRC." The agreement provided for review of compliance by the HRC at any

time.

In August 1976, the HRC staff prepared a summary of employment data provided by the Restaurants pursuant to the agreement. The summary, which was presented to the HRC, reported that for the years 1973 through 1975 many of the goals in the agreement had not been met.

The agreement proposed by the HRC for the annual period beginning October 15, 1976 was in most respects identical to the 1975-76 agreement, except that it set hiring goals at 50 percent minorities and 60 percent women and promotion goals at 80 percent minorities and 40 percent women. In addition, it stated: "It is noted that, in accordance with Chapter 12B of the San Francisco Administrative Code, each of the undersigned restaurants has, under its lease with the Port of San Francisco, already agreed 'not to discriminate on the ground or because of

race, color, creed, national origin, ancestry, age, sex or sexual orientation, against any employee of, or applicant for employment with said' restaurant. It is further noted that said restaurants are adopting an affirmative action agreement voluntarily."

The Restaurants rejected this proposed agreement. Instead, they proposed their own version of an industry-wide affirmative action agreement which was rejected by the HRC. The Restaurants have refused to enter into a new affirmative action agreement since that time.

When the Restaurants abandoned efforts to arrive at a 1976-77 affirmative action agreement acceptable to all parties, the HRC staff asked them to complete a ten page questionnaire on recruitment, hiring and training practices as a first step in analyzing their current level of compliance with the nondiscrimination requirements of their

leases. The Restaurants refused to answer this questionnaire. Instead, on February 4, 1977, they filed this action for writ of mandate and declaratory and injunctive relief. A subsequent non-jury trial resulted in a judgment in favor of the Restaurants from which the City has appealed.

II. Preemption

The City first contends that the non-discrimination and affirmative action provisions embodied in Chapter 12B of the San Francisco Administrative Code are not preempted by the former California Fair Employment Practices Act both because the Legislature did not intend to preclude local governments from including nondiscrimination requirements in their contracts and because the terms of such contracts are a municipal affair.

Generally, local governments may legislate upon matters of both local and statewide

concern. (Bishop v. City of San Jose (1969) 1 Cal.3d 56, 69-70.) However, under the pre-emption doctrine, local regulation of matters of statewide concern "remain[s] subject to and controlled by applicable . . . state laws . . . if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation." (Id. at pp. 61-62; Cal. Const., art. XI, § 7.) This doctrine is based upon the superior authority of the state as well as the need to prevent dual regulations which might result in confusion and uncertainty. (Abbott v. City of Los Angeles (1960) 53 Cal.2d 674, 682.) On the other hand, San Francisco, as a charter city, "may make and enforce all ordinances and regulations in respect to municipal affairs, [which] shall supersede all laws inconsistent therewith." (Cal. Const. art. XI, § 5, subd. (a); see also Smith v. City of Riverside (1973) 34 Cal.App.3d 529,

534.) "[O]rdinances relating to matters which are purely municipal affairs are not invalid because they are in conflict with general state laws or because state laws have been enacted to cover the same subject." (Baron v. City of Los Angeles (1970) 2 Cal.3d 535, 539; see also Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, 315.)

However, it is only in the event of conflict between the regulations of state and of local governments, or if the state Legislature discloses an intent to preempt the field that the question becomes one of predominance or superiority as between general state laws on the one hand and local regulations on the other. (See Bishop v. City of San Jose, supra, 1 Cal.3d 56, 62.) Since, for the reasons that follow, we hold that the provisions of Chapter 12B are entirely consistent with FEPA, it will not be necessary

to address the City's contention that the subject of the ordinance is a municipal affair.

A conflict between local and state regulation may arise where local government attempts to regulate in an area which is fully occupied by general law or where local regulation duplicates or contradicts state law. (Lancaster v. Municipal Court (1972) 6 Cal.3d 805, 807-808; Baron v. City of Los Angeles, supra, 2 Cal.3d 535, 541.) However, where the state's preemption of the field or subject is not complete, local supplemental legislation is not deemed conflicting to the extent that it covers phases of the subject which have not been covered by state law. (Baron v. City of Los Angeles, supra at p. 541.)

Certainly, the Legislature evinced an intent to occupy a major portion of the field of employment discrimination with the enact-

ment of former Labor Code section 1432, subdivision (c) which stated: "It is the intention of the legislature to occupy the field of regulation of discrimination in employment encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment by any city, city and county, county or other political subdivision of this state . . ." (See also 42 Ops.Atty.Gen. 114 (1963).)

A careful analysis and comparison of FEPA and the provisions of Chapter 12B, however, compels the conclusion that the Legislature did not intend to preclude municipalities from including nondiscrimination provisions in their leases.

The Fair Employment Practices Act was a comprehensive police power measure designed to protect individuals from discriminatory employment practices. (See former Lab. Code § 1411; Mahdavi v. Fair Employment Practice

Com. (1977) 67 Cal.App.3d 326, 333.) It established a complaint mechanism whereby an aggrieved individual or the Attorney General might initiate an investigation by the Fair Employment Practice Commission (hereinafter "FEPC") into such practices. (Former Lab. Code, § 1422.) The FEPC was empowered to issue formal accusations and to hold hearings. (Former Lab. Code, §§ 1423-1424.) Upon a finding that unlawful employment practices had occurred, the FEPC was required to issue a cease and desist order; it might also require the rehiring, reinstatement or upgrading of aggrieved employees. (Former Lab. Code, § 1426, subd. (a); see also 60 Opps.Atty.Gen. 394, 397 (1977).)

Chapter 12B, on the other hand, is an exercise of the City's contracting power. The ordinance does not ban discrimination in employment but merely prescribes certain provisions in City contracts. Those who find

such provisions burdensome may simply refuse to contract. While the ordinance provides an investigation and hearing procedure similar to that of FEPA (see San Francisco Administrative Code, § 12B.2, subds. (e) and (f)), its remedies inure primarily to the City's benefit and only indirectly to the benefit of employees. Thus, section 12B.2, subdivision (g) provides for a penalty of $50 per day for each person against whom the contractor has discriminated, to be deducted from the amount otherwise payable to the contractor. Since a breach of nondiscrimination provisions of the contract is deemed material, the City may cancel the contract; it may also bar the contractor from bidding on City contracts for up to two years. (§ 12B.2 subds. (g) and (h).)

In several opinions, the Attorney General has recognized that a local agency's insertion of nondiscrimination provisions in

its contracts is an exercise of its contracting power which falls outside the scope of the police power measures embodied in FEPA. (42 Ops.Atty.Gen. 169 (1963); 44 Ops.Atty. Gen. 114 (1963); 60 Ops.Atty.Gen. 394, 397 (1977).) In explaining the basis for his decision that the Berkeley Board of Education might properly include clauses prohibiting discrimination in employment in its construction contracts, the Attorney General observed that such clauses "would be intended and designed to protect the school district from entering into a contract for or expending funds on a project executed in a manner contrary to the laws of the state. Such clauses constitute examples of the exercise by the local entity of its contracting power, a determination of the nature of the contractural obligations it may desire to enter into and a requirement which provides a remedy not for the injured employee, but, instead, a

remedy to the public agency for the special injury it suffers." (44 Ops.Atty.Gen. 65, 67 (1964); see also 60 Ops.Atty.Gen. 394, 397 (1977).)

Amendments to FEPA subsequent to the Attorney General's opinions gave explicit recognition to the involvement of local human relations committees such as the HRC in the field of employment discrimination. In 1978, former Labor Code section 1431 was repealed and reenacted to read in relevant part as follows: "Where the division [of Fair Employment Practice] or a federal compliance agency has required the preparation of an affirmative action, equal employment, or nondiscrimination program subject to review and approval by the division or a federal compliance agency, evidence of such a program shall also constitute prima facie compliance with an ordinance or regulation of any city . . . which requires an employer to submit

such a program to a local awarding agency for its approval prior to becoming a contractor or subcontractor with such agency." (See also former Lab. Code, § 1420.5.) Being entirely consonant with the Attorney General's interpretation of FEPA, this provision was evidence of legislative intent to adopt such an interpretation. (See Wallace v. Department of Motor Vehicles (1970) 12 Cal.App.3d 356, 362-363; Smith v. Municipal Court (1959) 167 Cal.App.2d 534, 539.)

Our conclusion that Chapter 12B is supplemental to and outside the scope of FEPA finds further support in the existence of state and federal laws which require contractors to agree to nondiscrimination contractual provisions. Thus, it has been held that Executive Order No. 11246, 3 Code of Federal Regulations 339 (1965) which requires federal contractors to agree to such provisions is not preempted by Title VII of the Civil

Rights Act of 1964 which provides a remedy for victims of employment discrimination. (Contractors Ass'n of Eastern Pa. v. Secretary of Labor (3rd Cir. 1971) 442 F.2d 159, 170-171, cert. den., 404 U.S. 854.) Similarly, FEPA was supplemented by legislation and regulations pertaining to nondiscrimination in state contracts. (See Gov. Code §§ 11135-11139.5; Governor's Code of Fair Practices, art. IV.) The coexistence of such provisions makes it apparent that both our state and federal Legislatures have concluded that nondiscrimination provisions in contracts do not in any meaningful way interfere with the administration of general laws prohibiting discrimination in employment.

Based upon the foregoing analysis, we conclude that the trial court erred in ruling that FEPA occupied the field of employment discrimination so as to preclude the City

from inserting nondiscrimination and affirmative action provisions in its leases with the Restaurants.

III. The 1974 amendment to Chapter 12B

The City's next assignment of error questions the trial court's ruling that the Restaurants' leases fall outside the scope of Chapter 12B's coverage.

Since the ordinance was amended in 1974 specifically to include leases, the trial court's ruling is clearly erroneous as to the six restaurants which signed their leases after the 1974 amendment.

We view the City's right to prevail against the remaining eight restaurants which signed their leases prior to the enactment of this amendment as dependent upon the existence of authorization for the Port Commission's insertion of the nondiscrimination provision in the leases of those restaurants.

Each of these restaurants' leases states

that "[n]ondiscrimination provisions attached hereto are made a part hereof. Where the term 'contractor' is used it shall be deemed to mean 'tenant'." The parties are in agreement that this provision refers to the non-discrimination provisions embodied in Chapter 12B section 12B.2.

The Port Commission's powers under the City Charter include "the control and management of all real and personal property . . . placed under its management, supervision and control. . . . The Port Commission shall have the power to use, conduct, operate, maintain, manage, regulate, and control the port area of San Francisco and to do all things it deems necessary in connection with the use, conduct, operation, management, maintenance, regulation, improvement and control of said port area, or which may further the interests of the port in world trade, including, without limiting the generality of the foregoing,

the exclusive power to perform or accomplish the following . . . . (6) the grant of . . . the lease of said lands, facilities or any part hereof for limited periods not exceeding 66 years . . . (12) to enter into contracts, agreements, or stipulations germane to the scope of its powers and duties." (San Francisco Charter, Art. I, § 3.581.)

Under the broad language of this section, there can be little doubt that the insertion of nondiscrimination provisions in Port leases constitutes an excercise (sic) of the Port Commission's power and duty to "regulate and control the port area" and to "further the interests of the port in world trade." We therefore need not reach the issue whether Chapter 12B applied to leases prior to its 1974 amendment.

IV. The proposed affirmative action agreement

The City next challenges the trial court's declaration that "[the] Human Rights Commission of San Francisco and the San Francisco Port Commission, their servants, agents and employees, by requiring that [the Restaurants] enter into an Affirmative Action Agreement in the form and content prescribed by the Human Rights Commission of San Francisco are attempting to impose racial quotas on [the Restaurants]" in violation of the federal and state Constitutions and Title VII of the Civil Rights Act of 1964. The City contends that no substantial evidence was adduced at trial to support the court's finding that the Restaurants were being required to enter into a new affirmative action agreement.

In passing upon the sufficiency of the evidence, an appellate court must consider

the evidence in the light most favorable to the prevailing party. (Estate of Bristol (1943) 23 Cal.2d 221, 223; Estate of Teel (1944) 25 Cal.2d 520, 527; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.) Substantial evidence, however, is not any evidence. To support the judgment, the evidence must be reasonable in nature, credible and of solid value. (Estate of Teed (1952) 112 Cal.App.2d 638, 644; 6 Witkin, supra, § 252-253, pp. 4243-4245.)

Here, there was no evidence that the City was attempting to impose an affirmative action agreement upon the Restaurants. The only testimony presented on this issue was based upon several letters sent by the Human Rights Commission to the Restaurants. In these letters, which either accompanied a proposed affirmative action agreement or requested the Restaurants to answer a questionnaire regarding their employment prac-

tices, the HRC did not seek to impose its proposed agreement upon the Restaurants, but merely expressed a desire to enter into a new agreement through negotiation. The record is devoid of any evidence that the City intended to compel the Restaurants to enter into a new agreement in the event of their refusal to proceed with negotiations in good faith. On the contrary, uncontradicted evidence was presented that, if the Restaurants' responses to the questionnaire revealed compliance with Chapter 12B, section 12B.2, the City would release the Restaurants from any contractual or statutory obligation they may have had to enter into an agreement for the coming year. Indeed, the City has taken the position throughout these proceedings that section 12B.2 does not require the Restaurants to enter into an affirmative action agreement and that voluntary adoption of such an agreement was merely one of several ways in which

the Restaurant might produce evidence of compliance with the nondiscrimination requirements of section 12B.2.

V. The questionnaire

Lastly, the City questions the trial court's ruling that the Restaurants are not required to answer the HRC questionnaire inquiring into their recruitment, hiring and training practices as they relate to minority persons and women.

The judgment prohibiting the City from requiring that the Restaurants answer this questionnaire was based upon the finding that the HRC was using the questionnaire to coerce the Restaurants into entering into an affirmative action agreement which required hiring and promotional practices according to illegal racial quotas.

Provisions of Chapter 12B, which are binding upon the Restaurants pursuant to the terms of their leases, clearly authorize the

City to compel disclosure of the information sought. Section 12B.2, subdivisions (e) and (k) respectively require that a contractor must "on request provide evidence that he/she has or will comply with the nondiscrimination provisions in [his] contract "and will file with the Human Rights Commission . . . a basic compliance report, which may be a copy of the Federal EEO-1, or a more detailed report as determined by the [HRC]."

In United States v. State of N.H. (1st Cir. 1976) 539 F.2d 277, cert. den. 429 U.S. 1023 (1976), the United States brought suit to compel New Hampshire to file acceptable reports concerning the race, national origin and sex of employees as required by Title VII of the Civil Rights Act of 1964 and regulations promulgated thereunder. The court of appeal held that the regulations requiring disclosure of such information were reasonable and consistent with Title VII. In

rejecting the argument that the reporting requirement could not be upheld because the report might be misused to impose illegal hiring quotas, the court stated: "[P]ossible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data. Statistical information as such is a rather neutral entity which only becomes meaningful when it is interpreted. And any positive steps which the United States might subsequently take as a result of its interpretation of the data in question remain subject to law and judicial scrutiny." (Id. at p. 280.)

Here, the procedure for gathering employment statistics was reasonable and agreed to by the Restaurants under the terms of their leases. The record is totally devoid of any evidence that the City intended to use the information in any manner prohibited by law but merely shows that the infor-

mation was being sought to evaluate the Restaurants' compliance with the nondiscrimination provisions of their leases. Under these circumstances, the court's ruling on this issue cannot stand.

The judgment is reversed.

CERTIFIED FOR PUBLICATION.

Smith, J.

WE CONCUR:

Taylor, P. J.

Rouse, J.

Trial Court:	Superior Court City and County of San Francisco
Trial Judge:	Charles L. Peery
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Alioto's Fish Company, et al., v. Human Rights Commission of San Francisco, et al.
1 Civ. 45288 (Super. Ct. 718262)

APPENDIX 3

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SUPERIOR COURT OF CALIFORNIA,/

COUNTY OF SAN FRANCISCO

ALIOTO'S FISH COMPANY, LTD., A CORPORATION, et al., Petitioners vs. HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, et al., Respondents and Defendants.	No. 718 262 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on August 9, 1977, the Honorable CHARLES S. PEERY, Judge, presiding, without a jury, petitioners and plaintiffs, hereinafter referred to as plaintiffs,

appeared by their attorneys JAMES C. PURCELL and REGINALD R. ARMANDO, and respondents and defendants, hereinafter referred to as defendants, appeared by their attorney JUDITH L. TEICHMAN, Deputy City Attorney for the San Francisco City Attorneys Office.

Evidence, both oral and documentary, was introduced on behalf of all parties and the cause was argued and submitted for decision. The Court, having considered the evidence and heard the arguments of counsel, and being fully advised, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Court finds that:

1. At all times herein pertinent plaintiffs all operate restaurants in the Fisherman's Wharf area of San Francisco.

2. At all times herein pertinent the City and County of San Francisco was and is

the owner of the land which it leased to the respective plaintiffs and upon which plaintiffs restaurants are situated. All improvements thereon have been erected by plaintiffs with the express provision in their respective leases that the improvements thereon ultimately become the property of the City.

3. Rentals charged by the City and County of San Francisco through defendant SAN FRANCISCO PORT COMMISSION are based, in part, upon gross receipts and plaintiffs agree to operate in a manner to "secure maximum economic return". [as provided in the leases in Evidence. CP]

4. At all times herein pertinent, neither defendant SAN FRANCISCO PORT COMMISSION nor the City and County of San Francisco are or were in any way involved in the operation of plaintiffs restaurants or in any way identified with them.

5. At all times herein pertinent, defendants are the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO and the SAN FRANCISCO PORT COMMISSION duly constituted agencies of the City and County of San Francisco.

6. That at all times herein relevent ESSIE THOMAS and WAYNE C. REDUS were duly constituted agents and employees of defendant HUMAN RIGHTS COMMISSION OF SAN FRANCISCO and entrusted with the official responsibility of, among other things, administrating the provisions of Chapter 12B of the San Francisco Administrative Code.

7. That the SAN FRANCISCO PORT COMMISSION and the SAN FRANCISCO HUMAN RIGHTS COMMISSION and all of the commissioners then serving on both commissions at the time of the filing of this action, have been served in this action and have appeared through counsel.

8. Prior to 1975, [(and subsequent thereto) CP] plaintiffs and each of them have entered into leases of property owned and under the jurisdiction of the SAN FRANCISCO PORT COMMISSION and pertaining to the operation of their respective restaurants. [(as shown by Exhibit #35) CP]

9. For a number of years prior to 1976, plaintiffs and each of them have, as required by the SAN FRANCISCO PORT COMMISSION and the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, entered into so-called Affirmative Action Agreements prepared by defendant HUMAN RIGHTS COMMISSION, which agreements have been adopted and made a part of plaintiffs respective leases. Said agreements were term agreements and have expired.

10. Defendant SAN FRANCISCO PORT COMMISSION on August 27, 1975, as evidenced by plaintiffs Exhibit #32 in evidence and by the testimony of RICHARD SKAFF of the Franciscan

Restaurant and ALESSANDRO BACCARI on other occasions, has demanded that plaintiffs respectively enter into an Affirmative Action Agreement with the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO.

11. That on September 11, 1976, as evidenced by plaintiffs Exhibit #40 in evidence, ESSIE THOMAS, of the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO forwarded a draft copy of a proposed Affirmative Action Agreement to the Franciscan Restaurant on September 21, 1976. Similar letters were mailed to each of the other plaintiffs herein as well.

12. That WAYNE C. REDUS of the HUMAN RIGHTS COMMISSION of SAN FRANCISCO as evidenced by plaintiffs Exhibit #38 in evidence, caused to be mailed to the Waterfront Restaurant a letter stating that in view of the fact that the previous Affirmative Action Agreement expired on October 25, 1976 and since there was not then an Affirmative

Action Agreement in effect, that plaintiff was required to submit answers to a questionnaire on recruitment, hiring and training practices and stated "there is currently no evidence of compliance with Chapter 12B exhibited by plaintiff's restaurant". Said letter further threatened said plaintiff restaurant with the possible "initiation of non-compliance proceedings against your restaurant". Similar letters were mailed to all plaintiffs herein on more than one occasion.

13. That defendants herein by threats and coercion are attempting to exercise the police power of the City and County of San Francisco by attempting to cause plaintiffs to enter into an Affirmative Action Agreement, the contents of which are dictated by defendants and doing so under the guise of purportedly voluntary agreements with the respective plaintiffs.

14. That ESSIE THOMAS, an employee of the SAN FRANCISCO HUMAN RIGHTS COMMISSION, as evidenced by plaintiffs Exhibit #47 in evidence in a certain memorandum that was widely circulated in the City and County of San Francisco, dated August 3, 1976 accused plaintiffs of not meeting "hiring, training and promotion goals . . .", stating further in said report that plaintiffs in 1973 had 52.8% minorities on their payroll and that in 1975, 52.9% of plaintiffs employees were minorities.

Said report consists of detailed specification of minority status employees, including such categories as Native American Indians, Spanish, other non-whites, Caucasion, Japanese, Chinese, Filipino and blacks.

A complete survey was made of all employees together with categories of "visible" and "non-visible" jobs and concluded that each of plaintiffs is in violation for such

reasons as that certain plaintiffs have not employed a Native American Indian, certain plaintiffs have not employed a Japanese or a Filipino, and additionally, complaint is made that there are too few minorities employed in "visible" job categories.

15. That prior to the Memorandum dated August 3, 1976 as evidenced by plaintiffs Exhibit #37, an attempt was made by plaintiffs as a result of coercion by the defendant HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, to develop a mutually acceptable Affirmative Action Agreement for the year 1976, however, all attempts to arrive at a mutually acceptable agreement for said year broke down with threats by defendant HUMAN RIGHTS COMMISSION OF SAN FRANCISCO that unless their agreement was accepted by plaintiffs, that plaintiffs leases would be cancelled.

16. That ESSIE THOMAS, an employee of the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, as evidenced by plaintiffs Exhibit #41 in evidence, in August of 1976 caused [(or released for) CP] --------- publication [article] in the [D]daily [C]commercial [N]news and the San Francisco Chronicle, ---------- [CP] accusing plaintiffs of discrimination against minorities in connection with plaintiffs hiring practices and threatening plaintiffs with the cancellation of their respective leases with the City and County of San Francisco unless each of the plaintiffs entered into the proposed Affirmative Action Agreement prepared by defendant HUMAN RIGHTS COMMISSION OF SAN FRANCISCO.

17. That ESSIE THOMAS, an employee of the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, instructed RICHARD SKAFF of the Franciscan Restaurant to segregate all applications for employment on the basis of race. [(and to

maintain records of minority applications) CP]

18. That defendant HUMAN RIGHTS COMMISSION OF SAN FRANCISCO is attempting to impose quotas on plaintiffs in their hiring and promotion practices under the guise of Affirmative Action Agreements.

19. That the State of California, by enactment of the Fair Employment Practice Act as set forth in Sections 1410 through 1433 of the Labor Code, has preempted the field of statutory control of fair employment practices and that cities and counties may not establish administrative bodies to enforce the provisions of any ordinance relating to discrimination in employment.

20. That there are certain aspects of Chapter 12B of the San Francisco Administrative Code which are not contested by plaintiffs herein. Those include such matters as the SAN FRANCISCO HUMAN RIGHTS COMMISSION

right to act as an advisory group to encourage all employers in San Francisco to comply with existing law and not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age, sex, sexual orientation or disability.

21. That defendants have no scientific or objective basis whatsoever by which they classify people into one racial category or another, for purpose of granting preference or imposing detriments or obstacles concerning job opportunities or promotions with plaintiffs.

Defendants have no dispute - resolution procedure by which a person seeking to be placed in one category instead of another can complain or by which a person complaining of the categorization of another person may complain.

22. There has been long standing discrimination against minorities and women by our society. However, the acts complained of in the above entitled action are not justified by, nor do they remedy, past wrongs by society against any such minorities or women.

Furthermore, the acts complained of and more particularly described in these findings of fact and conclusions of law, operate to the detriment of non-minorities and to the innocent plaintiffs herein who all who (sic) operate restaurants in the Fisherman's Wharf area of San Francisco upon property leased from the City and County of San Francisco, who have played no role in any previous discrimination by portions of our society.

23. Unless restrained by order of this Court, defendants HUMAN RIGHTS COMMISSION OF SAN FRANCISCO and the SAN FRANCISCO PORT COMMISSION and their servants, agents and employees, will continue to attempt to coerce

and force plaintiffs herein to enter into a proposed Affirmative Action Agreement in the form and content set forth as plaintiffs Exhibit #34 in evidence as prescribed by the SAN FRANCISCO HUMAN RIGHTS COMMISSION and further that the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO will attempt to coerce and force plaintiffs into answering questions of the type pronounced in that certain questionnaire, a copy of which is marked Exhibit #33 in evidence.

24. Plaintiffs have no plain, speedy or adequate remedy at law other than the relief prayed for in documents filed with this court with regard to demands of defendants.

Plaintiffs have suffered and will continue to suffer, irreparable injury and damage in connection with the operation of their respective businesses in that they, and each of them, have been and will continue to be required to subscribe to a quota system

dictated by the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO and, in so doing, will be required to deny employment to applicants who are not minorities as the term minority is defined by the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO under the guise of an Affirmative Action Agreement which is violative of the Federal and State Constitutions and constitute reverse discrimination. Unless the defendants are enjoined from continuing the aforesaid actions, will cause irreparable injury and damage to plaintiffs herein.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court makes the following conclusions of law:

1. Plaintiffs are entitled to injunctive relief.

2. Plaintiffs are entitled to a declaratory judgment setting forth that defendants HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, SAN FRANCISCO PORT COMMISSION,

their servants, agents and employees, by engaging in the practices above described, have violated and are continuing to violate the Fourteenth Amendment to the United States Constitution, Title 7 of the Civil Rights Act of 1964, 42 U.S.C. Sections 1981 and 1983 and California Constitution Article 11, Section 11.

3. That the State of California, by enactment of the Fair Employment Practice Act as set forth in Section 1410 through 1433 of the Labor Code, has preempted the field of statutory control of fair employment practices and that cities and counties may not establish administrative bodies to enforce the provisions of any ordinance relating to discrimination in employment. This Court has jurisdiction to grant relief under each of the above quoted constitutional provisions and/or pieces of legislation.

4. That Chapter 12B of the San Francisco Administrative Code does not apply to the leases of plaintiffs herein and that said leases are not within the term "contract" as such term is used in said Chapter of said code.

5. That defendants herein are attempting by coercion to exercise the police power of the City and County of San Francisco under the guise of purportedly voluntary agreements with the respective plaintiffs.

6. That the defendant HUMAN RIGHTS COMMISSION OF SAN FRANCISCO is attempting to impose racial quotas upon plaintiffs in their hiring and promotional practices under the guise of Affirmative Action Agreements which are violative of the Federal and State Constitution and constitute reverse discrimination.

7. That plaintiffs are not required to respond to questions presented to them by the

HUMAN RIGHTS COMMISSION OF SAN FRANCISCO nor are they required to enter into an Affirmative Action Agreement with the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO.

8. That the addendum to plaintiffs leases are wholly null and void and of no application.

Judgment is hereby ordered to be entered accordingly.

DATED: November 29, 1977

_____

JUDGE OF THE SUPERIOR COURT

APPENDIX 4

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Filed Nov. 29, 1977
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Entered
Nov. 30, 1977
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By A. Gentle,
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA,/

COUNTY OF SAN FRANCISCO

ALIOTO'S FISH COMPANY, LTD., A CORPORATION, et al., Petitioners and Plaintiffs, vs. HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, et al., Respondents and Defendants.	No. 718262 JUDGMENT AND DECLARATORY JUDGMENT

The above entitled matter came on regularly for trial on August 9, 1977. The trial was concluded on August 10, 1977. The parties submitted post trial briefs and the Court having heard the testimony, received

the oral and documentary evidence and having considered oral and written arguments offered by the respective parties, and having made its findings of fact and conclusions of law, and good cause appearing:

IT IS THE DECLARED JUDGMENT OF THIS COURT THAT:

(1) Respondents and defendants HUMAN RIGHTS COMMISSION OF SAN FRANCISCO and the SAN FRANCISCO PORT COMMISSION, their servants, agents and employees, by requiring that petitioners and plaintiffs herein enter into an Affirmative Action Agreement in the form and content prescribed by the HUMAN RIGHTS COM-MISSION OF SAN FRANCISCO are attempting to impose racial quotas on petitioners and plaintiffs in their hiring and promotion practices, which racial quotas under the guise of Affirmative Action Agreements, have violated and are continuing to violate the Fourteenth Amendment of the

United States Constitution, Title 7 of the Civil Rights Act of 1964, 42 USC Sections 1981 and 1983, California Constitution Article II, Section 11 and constitutes reverse discrimination.

(2) That the State of California, through the enactment of the California Fair Employment Practices Act, has preempted the field of legislation and that local governments are enjoined from enacting their versions of the same type of legislation and that consequently, Chapter 12B of the San Francisco Administrative Code, insofar as it applies to leases is declared null and void. Further, there is no basis for involvement on the part of the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO in lease negotiations conducted by the City and County of San Francisco for and on behalf of the SAN FRANCISCO PORT AUTHORITY.

(3) That Chapter 12B of the San Francisco Administrative Code has no applicability to petitioners and plaintiffs herein.

(4) This Court has jurisdiction to grant relief under each of the above quoted constitutional provisions and/or pieces of legislation.

(5) Petitioners and plaintiffs herein are not required to respond to questions presented to them by the HUMAN RIGHTS COMMISSION, nor are they required to enter into an Affirmative Action Agreement with the HUMAN RIGHTS COMMISSION, further, respondents and defendants HUMAN RIGHTS COMMISSION OF SAN FRANCISCO and the SAN FRANCISCO PORT COMMISSION, their servants, agents and employees by engaging in attempting to coerce petitioners and plaintiffs into completing questionnaires in the form and content prescribed by the HUMAN RIGHTS COMMISSION OF SAN FRANCISCO and in attempting to require that the petitioners

and plaintiffs herein enter into an Affirmative Action Agreement with the said HUMAN RIGHTS COMMISSION OF SAN FRANCISCO in the form and content prescribed by the said HUMAN RIGHTS COMMISSION OF SAN FRANCISCO and by the arbitrary and capricious nature of the racial categorization process (as particularly described by findings of fact and conclusions of law adopted by the Court) have deprived and are continuing to deprive petitioners and plaintiffs of substantive and procedural due process of law within the meaning of both the Fourteenth Amendment to the United States Constitution and within the meaning of Article I, Section 7 of the California Constitution and petitioners and plaintiffs are entitled to a permanent injunction prohibiting respondents and defendants from pursuing said course of conduct.

IT IS FURTHER ORDERED THAT:

1. A permanent injunction, attached hereto marked Exhibit "A" and incorporated herein by reference issue in this case.

2. Petitioners and plaintiffs shall recover their costs in this action.

DATED: November 29, 1977.

Charles S. Peery
JUDGE OF THE SUPERIOR COURT

APPENDIX 5

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Filed Nov. 29, 1977
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Entered
Nov. 30, 1977
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By A. Gentle,
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA,/

COUNTY OF SAN FRANCISCO

ALIOTO'S FISH COMPANY, LTD., A CORPORATION, et al., Petitioners and Plaintiffs, vs. HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, et al., Respondents and Defendants.	No. 718262 PERMANENT INJUNCTION

TO: HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, SAN FRANCISCO PORT COMMISSION AND TO THEIR OFFICERS, AGENTS, SERVANTS, AND EMPLOYEES, AND ALL PERSONS ACTING IN CONCERT WITH THEM

The above-entitled matter came on regularly for trial on August 9, 1977. The trial

was concluded on August 10, 1977; the parties submitted post trial briefs.

The Court having heard the testimony, received the oral and documentary evidence, and having considered the oral and written arguments offered by the respective parties, and having issued its notice of intended decision, filed herein on October 17, 1977 and having adopted its findings of fact and conclusions of law and making and entering its judgment, and good cause appearing:

IT IS HEREBY ORDERED THAT respondents and defendants HUMAN RIGHTS COMMISSION OF SAN FRANCISCO and the SAN FRANCISCO PORT COMMISSION and their officers, servants, and employees and each of them, and all persons acting in concert or participating with such parties, entities or persons, shall be, and they hereby are, enjoined and restrained from engaging in, committing or performing direct-

ly or indirectly, or by any means whatsoever, any and all of the following acts:

1. From requiring that petitioners and plaintiffs or any of them enter into Affirmative Action Agreements and/or to answer questions in connection therewith or related thereto.

2. From taking any action against any petitioner or plaintiff in this action, or any witness who testified in the trial or other hearings in this action, or any person participated in or cooperated in any way in the prosecution of this action, or from imposing any detriment whatsoever upon any such person or party or entity for such involvement in this action.

DATED: November 27, 1977.

Charles Peery
Judge of the Superior Court

Opposition

Office - Supreme Court, U.S.
FILED
JAN 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1137

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ALIOTO'S FISH COMPANY, LTD., et al.,
Petitioners,

VS.

HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTION PRESENTED

Whether review by the Supreme Court is available pursuant to 28 USC § 1257(3) (federal question), where no federal questions are presented *unless* the Supreme Court reverses a state appellate court ruling on the lack of an evidentiary basis under state law for findings of fact which findings, if sustained, might have given rise to questions under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution.

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No. 81-1137

In the Supreme Court

OF THE

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OCTOBER TERM, 1981

ALIOTO'S FISH COMPANY, LTD., et al.,
Petitioners,

VS.

HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

I

STATEMENT OF THE CASE

Petitioner restaurants lease property on San Francisco's famed "Fisherman's Wharf" from the City and County of San Francisco through the City's Port Commission. Their leases incorporate employment nondiscrimination requirements imposed on all City contractors. The nondiscrimination requirements are enforced through the City's Human Rights Commission.

As evidence of their compliance with the employment nondiscrimination requirements, petitioner restaurants entered into industry-wide, annual affirmative action agreements between 1970 and 1975, containing goals for the

hiring, training and promotion of minority and female employees. The agreements stated a policy of non-discrimination in employment practices, set forth a procedure which, subject to the terms of collective bargaining agreements, was to be followed in recruiting employees, contained commitments regarding training and required the restaurants to submit an annual employment survey as well as quarterly reports on various personnel actions by race, ethnic group and sex.

The Fisherman's Wharf restaurants' affirmative action agreement enabled the restaurants to demonstrate their compliance with the City's nondiscrimination requirements. Absent an affirmative action agreement, however, it was necessary for the City to evaluate on a restaurant-by-restaurant basis petitioners' compliance with the nondiscrimination provisions in the leases. Thus, when the parties were unable to agree on the terms of an industry-wide affirmative action agreement for fiscal year 1976-1977, the Human Rights Commission asked the individual restaurants to answer a questionnaire inquiring into their recruitment, hiring and training practices as they relate to minority persons and females.

Petitioners' position is that the questionnaire was used not to enable the City to determine compliance with the nondiscrimination requirements, but, rather, to coerce the restaurants into entering into an affirmative action agreement, and that the "agreement", the terms of which have not been established, violated the requirements of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution.

The trial court found that respondents were attempting to impose employment quotas on petitioners by requiring them to enter into and comply with an affirmative action agreement. See Finding #13 on page 7 and Finding #18 on page 11 of the trial courts' Findings of Fact and Conclusions of Law which appear as Appendix 3 to the Petition, hereafter referred to as "Findings and Conclusions".

Having made the foregoing findings, the trial court concluded as a matter of law that respondents were violating the Fourteenth Amendment to the United States Constitution and Title VII of the Civil Rights Act of 1964. Conclusions of Law #2, Findings and Conclusions.

The state appellate court reversed the foregoing findings and conclusions of law by the trial court holding that "there was no evidence that the City was attempting to impose an affirmative action agreement upon the [Petitioners]." Page 12 of the Opinion of the Court of Appeal of the State of California, First Appellate District, Division 2, a copy of which appears as Appendix 2 to the Petition, hereafter referred to as "Opinion". Having reversed those findings, the highest California court to rule in this case did not have before it and did not rule on any Title VII, Equal Protection or other *federal* issue.

The "statement of the case" provided by petitioner restaurants is inaccurate or misleading in the following respects:

1. Although earlier affirmative action agreements stated that all Fisherman's Wharf restaurants would have to become signators to the agreement, see Petition, fn. 2, page 9, it was not a condition of the contin-

uation of their leases with the Port of San Francisco that petitioner restaurants enter into an affirmative action agreement for fiscal year 1976-77. The agreement proposed for 1976-77 explicitly noted that it was being adopted voluntarily. Opinion 12. See also Opinion 28-30.

2. The affirmative action provisions in the agreements between the parties from 1970 and 1975 were stated in terms of "goals", not "mandatory quotas," as described by petitioners. Opinion 9-12.

3. The 1970 to 1975 affirmative action agreements provided that the affirmative action procedures to be followed were "subject to collective bargaining agreements." Contrary to the implications in petitioners' statement of the case, the affirmative action procedures provided that vacant positions would be filled initially by rehiring employees on lay-off status or by promoting from within the restaurant staff. If the vacancy could not be filled by rehiring or promotion, the restaurant was to seek a referral from the union "with an emphasis on affirmative action recruitment." If the restaurant was unable to fill the vacancy from these sources, the restaurant was to utilize its affirmative action file which consisted of minority and female applicants not hired at the time of application. If the restaurant was still unable to fill the position, it was to recruit from a referral source list provided by the City's Human Rights Commission. Opinion 8-9.

II

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. No Federal Rights Were Adjudicated by the State Appellate Court Therefore There Is No Basis For Reviewing the Decision of the State Appellate Court

The state appellate court did not adjudicate any federal rights thus this is not an appropriate case for issuance of a writ of certiorari to review the decision of the state appellate court. In the language of Justice Jackson in *Herb v. Pitcairn* (1954) 324 U.S. 117, 125-126:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent grounds. [Citations omitted.] The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. *Our only power over state judgements is to correct them to the extent they incorrectly adjudge federal rights.*" (Emphasis added.)

Petitioners alleged federal questions in the trial court. The trial court made findings of fact which appeared to give rise to federal questions involving Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution and the trial court ruled on the federal questions.

The state appellate court reversed the trial court's findings on the ground that there was no evidence to support

them. Opinion 28-30. Having reversed the findings, the state appellate court did not have before it any federal issues and did not adjudicate any federal rights.

It could be argued that the state appellate court decided a federal issue when it ruled that the questionnaire inquiring into recruitment, hiring and training positions by race, ethnic origin and sex was permissible. Opinion 30-33. The issue was settled in *United States v. State of New Hampshire* (1st Cir. 1976) 539 F.2d 277, cert.den. 429 U.S. 1023 (1976), however, and petitioners have not challenged this portion of the state appellate court's decision.

Since no federal rights were adjudicated by the state appellate court, there can be no adjudication of federal rights to be corrected. Since there is no adjudication of federal rights to be corrected, there is no basis for this Court to review the state appellate court decision and the Petition for a Writ of Certiorari should be denied under the rule set down in *Herb v. Pitcairn.*

B. The Controversy Between the Parties Herein Was Resolved in the State Court On the Basis of the Insufficiency of the Evidence to Support Certain Findings of Fact as a Matter of State Law

Petitioners begin their argument in support of issuance of a writ with the following misleading assertion:

> "Contrary to the opinion below, the restaurants have clearly presented sufficient evidence to show that a real controversy exists between it [sic] and the HRC which warrants equitable judicial relief." Petition 17.

The assertion is misleading in that the state appellate court did not decline to rule on any issue on the grounds

that there was no controversy. Rather, the court adjudicated several of petitioners' claims:

1. Whether the City's contractually imposed employment nondiscrimination requirement was preempted by state law (Opinion 13-24);

2. Whether the nondiscrimination requirement applied to the leases of all of the petitioners (Opinion 24-27);

3. Whether there was substantial evidence to support the trial court's finding that the City was attempting to impose an affirmative action agreement on petitioner restaurants (Opinion 27-30); and

4. Whether the use of a questionnaire to obtain employment statistics was reasonable and within the terms of the nondiscrimination requirements in petitioners' leases (Opinion 30-33).

The state appellate court concluded that there was *no* evidence to support the trial court's finding that respondents were requiring petitioners to enter into an affirmative action agreement. Since under California law there must be "substantial evidence" to support a trial court finding, the state appellate court was, in effect, ruling as a matter of state law that there was no substantial evidence to support the conclusion of the trial court that the City was not attempting to impose an affirmative action agreement on respondents. See *Foreman and Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Cummins v. Scott* (1862) 20 Cal. 83; and *Pacific Palisades Assn. v. Menninger* (1933) 219 Cal. 257, 276; and the discussion in Opinion 27-30.

Stripped of the misleading introductory argument on pages 17-20 of the Petition, the instant petition seeks no more and no less than a review by this Court of an evidentiary question under California law.

C. The State Appellate Court Did Not Adjudicate Any Rights Under Title VII of the Civil Rights Act of 1964

The state appellate court did not decide whether the terms of an affirmative action agreement conflict with the requirements of Title VII of the Civil Rights Act of 1964 because it found that the City was not requiring petitioners to enter into an affirmative action agreement. As a practical matter, there was no particular affirmative action agreement for the court to evaluate even if the state appellate court had not reversed the trial court's findings. The affirmative action agreements for the years 1970-1975 had expired and petitioners had rejected the affirmative action agreement proposed by the respondents for 1976-77. (This suit was filed in 1977.)

In summary, petitioners' reliance on the trial court's finding that respondents were coercing them into entering into an affirmative action agreement for their claim that a Title VII issue is posed is misplaced for the state court of appeal found that finding devoid of evidentiary support.

D. The State Appellate Court Did Not Adjudicate Any Rights Under the Equal Protection Clause

Petitioners argue that the affirmative action plan and the questionnaire raise equal protection issues. As discussed above, there is no affirmative action agreement before this Court and there can be no constitutional defect in a non-

existent affirmative action agreement. In addition, petitioners' argument that the information obtained through the questionnaire will be misused to impose illegal quotas in violation of equal protection requirements is equally spurious. The factual claim was not proved in the California court, and a petition for writ of certiorari is not the appropriate proceeding in which to prove facts.

The trial court did not explicitly find that the information sought through the questionnaire would be used for the purpose of imposing employment quotas. (The questionnaire was referenced only in Finding # 12 on pages 6-7 and Finding # 23 on page 24 of the Findings and Conclusions.) Furthermore, the state court of appeal specifically rejected the claim that information obtained through the questionnaire would be misused. Rather, the court of appeal held that the evidence in the record unequivocally established that the City sought the information only to evaluate petitioners' compliance with the contractually imposed nondiscrimination requirements. Opinion 32-33.

The state appellate court adjudicated no equal protection issue and no such issue is raised by this case unless this Court overrules the state appellate court ruling on the factual issues discussed herein.

III

CONCLUSION

The state appellate court did not adjudicate in this case any federal rights. There is no federal question presented by the Petition for a Writ of Certiorari and the Writ should be denied.

Dated: January 13, 1982

Respectfully submitted,

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